

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Claimant began working as a cashier-shuttle bus driver for respondent in August 2009. She would shuttle employees to and from the parking lot. In November 2009, claimant began having pain in her neck, shoulders and arms. She was required to manually open and close the passenger door with her right arm. Physically, she would be pushing and pulling her entire shift and sometimes would work a double shift.

When claimant initially complained to respondent she was told to see her family physician but later was referred to Dr. Angela Moore. Dr. Moore obtained a cervical MRI which was unremarkable. Dr. Moore provided claimant medication, performed osteopathic manipulative therapy as well as physical therapy. When the treatment failed to relieve claimant's pain complaints, Dr. Moore referred claimant to Dr. Harry Morris.

Dr. Morris reviewed claimant's medical history and performed a physical examination of claimant. Dr. Morris determined there was no condition that required surgery and diagnosed claimant with myofascial pain syndrome. Dr. Morris recommended a home exercise program for claimant. At the next visit claimant continued to complain of pain radiating from her shoulders into her neck and down into her hands. Dr. Morris prescribed a nerve conduction study which showed no evidence of cervical radiculopathy nor focal compression either at the ulnar nerve at the elbow or the median nerve at the wrist. Dr. Morris again diagnosed myofascial pain syndrome and recommended a home exercise program, anti-inflammatory medications occasionally and modalities to help her with her discomfort. Dr. Morris did not think claimant required any specific work restrictions.

Claimant then sought treatment recommendations from Dr. Murati. Dr. Murati reviewed claimant's medical history and performed a physical examination. Dr. Murati recommended claimant have an MR arthrogram of the left shoulder as well as physical therapy. Dr. Murati further recommended physical therapy and cortisone trigger point injections for the myofascial pain syndrome as well as anti-inflammatory medications and pain medications as needed. Dr. Murati also imposed temporary work restrictions.

Consequently, at the time of the scheduled preliminary hearing on February 24, 2011, claimant had been evaluated and released from Dr. Morris' care. Dr. Murati had performed a medical examination and recommended additional treatment. So, the ALJ issued an IME Order for Dr. Stein to perform an independent medical examination. On April 4, 2011, Dr. Stein examined and evaluated claimant due to complaints of pain from her neck to the lower back. The doctor reviewed claimant's extensive medical history and performed a physical examination. Dr. Stein noted that there was some evidence of symptom magnification but there was no evidence of injury as the claimant had full range

of cervical, lumbar, and shoulder movement. Dr. Stein further noted there was no muscular spasm or neurological deficit. The only finding was multiple areas with complaints of tenderness to palpation. Dr. Stein diagnosed claimant with chronic pain syndrome which he stated was a waste basket diagnosis for someone with widely spread pain and no definitive diagnosis. Dr. Stein concluded that he had no treatment recommendations other than possible psychological testing to determine the absence or presence of psychological or secondary gain factors contributing to the physical complaints.

At the preliminary hearing held on June 14, 2011, claimant again requested the medical treatment recommended by Dr. Murati. It is significant to note that at the preliminary hearing the respondent agreed that compensability was not an issue. As previously noted, the ALJ denied claimant's request for additional medical treatment finding that claimant failed to establish that she was in need of or would benefit from additional treatment. Claimant then filed the instant appeal.

Initially, respondent argues that the Board does not have jurisdiction to consider the issue of medical treatment. This Board Member agrees. This is an appeal from a preliminary hearing order and not every alleged error is subject to review. The Workers Compensation Act gives this Board specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are: (1) did the worker sustain an accidental injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide the employer with timely notice and with timely written claim; and, (4) do certain other defenses apply. And the term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.¹ Moreover, the Board can review preliminary hearing orders in which an ALJ is alleged to have exceeded his or her jurisdiction.²

The issue of whether a worker needs ongoing medical treatment is not a jurisdictional issue listed in K.S.A. 44-534a that is subject to review from a preliminary hearing order. That is an issue over which an ALJ has the sole authority and jurisdiction to determine at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

¹ *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

² K.S.A. 44-551(b)(2)(A).

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

Although claimant also argues that the ALJ exceeded his jurisdiction in not ordering the medical treatment, this Board Member disagrees. The ALJ evaluated the evidence, including the independent medical examination report authored by Dr. Stein and concluded that claimant failed to meet her evidentiary burden as to her entitlement to additional medical treatment. There is nothing within this determination, based upon the evidence contained within this record, that suggests the ALJ exceeded his jurisdiction in making this determination.

Claimant further argues that Dr. Stein determined that claimant's complaints were caused by automobile accidents that occurred before the instant injuries. Dr. Stein mentioned the automobile accidents but simply noted that claimant had similar complaints after the automobile accidents and may be predisposed for the type of symptomatology she exhibits. There was no determination that the current complaints were due to the automobile accidents. Moreover, compensability was not an issue at the preliminary hearing. This Board Member finds that the ALJ did have the jurisdiction at the preliminary hearing to decide claimant's entitlement to medical treatment and that the Board does not have jurisdiction to consider that issue at this time. The claimant's appeal as to that issue is, therefore, dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the claimant's appeal is dismissed and the Order of Administrative Law Judge John D. Clark dated June 14, 2011, remains in full force and effect.

IT IS SO ORDERED.

Dated this _____ day of August, 2011.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2010 Supp. 44-555c(k).

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John D. Clark, Administrative Law Judge